FILED
JAN 29 1992
OFFICE OF THE CLERK

No. 91-867

In the Supreme Court of the United States

OCTOBER TERM, 1991

ESTATE OF WILLIAM F. MCALLISTER, DECEASED, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

KENNETH W. STARR
Solicitor General

STUART M. GERSON
Assistant Attorney General

ROBERT S. GREENSPAN
LOWELL V. STURGILL JR.
Attorneys
Department of Justice
Washington, D.C. 20530
(202) 514-2217

QUESTION PRESENTED

Whether *Feres* v. *United States*, 340 U.S. 135 (1950), bars petitioners' action under the Federal Tort Claims Act to recover for the death of a member of the military that occurred on an Army base at the hands of a fellow serviceman.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	3
Conclusion	6

TABLE OF AUTHORITIES

Cases:

Dozler v. *United States*, 869 F.2d 1165 (8th Cir. 1989)	4
Feres v. *United States*, 340 U.S. 135 (1950)	3
Major v. *United States*, 835 F.2d 641 (6th Cir. 1987), cert. denied, 487 U.S. 1218 (1988)	5
Millang v. *United States*, 817 F.2d 533 (9th Cir. 1987)	5
Morey v. *United States*, 903 F.2d 880 (1st Cir. 1990)	5
Persons v. *United States*, 925 F.2d 292 (9th Cir. 1991)	5-6
United States v. *Johnson*, 481 U.S. 681 (1987)	5
United States v. *Shearer*, 473 U.S. 52 (1985)	3, 4, 5
United States v. *Stanley*, 483 U.S. 669 (1987)	5

Statute:

Federal Tort Claims Act, 28 U.S.C. 2671 *et seq.*	2

In the Supreme Court of the United States

OCTOBER TERM, 1991

No. 91-867

ESTATE OF WILLIAM F. MCALLISTER, DECEASED, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-16) is reported at 942 F.2d 1473. The opinion of the district court is unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 28, 1991. The petition for a writ of certiorari was filed on November 26, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. On the evening of December 31, 1986, Lieutenant Colonel William F. McAllister, an active-duty member of the U.S. Army, was stabbed and killed by Private Leon Tarver, also a member of the Army. Pet. 4. The stabbing occurred on the Army base at the Presidio in San Francisco, California, as Colonel McAllister was leaving the base on personal business. Pet. App. 4.

At the time of the stabbing, Private Tarver was under the care and supervision of U.S. Army officials as a patient of the Letterman Army Hospital on the Presidio grounds. Tarver had first been assigned to the hospital for treatment in March 1986, after he was diagnosed as a "paranoid schizophrenic with potentially dangerous tendencies." Pet. App. 4. He was released to active duty in June 1986, but he was transferred back to the Letterman Army Hospital in October 1986, after again being diagnosed as schizophrenic and potentially dangerous. *Ibid.*

2. Colonel McAllister's estate and members of his family brought this wrongful death action against the United States under the Federal Tort Claims Act (FTCA), 28 U.S.C. 2671 *et seq.* The complaint alleged that the Army and its agents "carelessly, wrongfully and negligently fail[ed] to properly supervise, control and treat said Private Tarver" and "fail[ed] to otherwise protect [McAllister] from [Tarver]," even though the Army "knew or should have known that Private Tarver posed a foreseeable risk of harm to the public." Pet. App. 11 n.3 (quoting Compl. ¶ 10).

3. The United States District Court for the District of Oregon dismissed the complaint for lack of

subject matter jurisdiction. See Pet. App. 2. The court relied on *Feres* v. *United States*, 340 U.S. 135, 146 (1950), which bars FTCA claims "for injuries to servicemen where the injuries arise out of or are in the course of activity incident to service."

4. The court of appeals affirmed, Pet. App. 1-16, finding that the facts of this case were "strikingly analogous" (*id.* at 10) to those of *United States* v. *Shearer*, 473 U.S. 52 (1985), where this Court applied the *Feres* doctrine to bar an FTCA suit brought by the estate of a serviceman who had been killed by another serviceman, allegedly as a result of negligent government supervision. Pet. App. 10.

ARGUMENT

The court of appeals correctly concluded that this case is controlled by *United States* v. *Shearer*, 473 U.S. 52 (1985). Petitioners' arguments to the contrary are unpersuasive.

In *Shearer*, this Court held that the *Feres* doctrine barred an FTCA suit against the government brought by the estate of a serviceman who had been kidnappd and murdered by another serviceman. The complaint in *Shearer* alleged that the Army "negligently and carelessly failed to exert a reasonably sufficient control over" the serviceman who committed the murder, even though the Army "knew [he] was dangerous." 473 U.S. at 54. The court of appeals in *Shearer* held that *Feres* was inapplicable because at the time of the murder the victim was off duty, away from the Army base, and not engaged in military activity. 473 U.S. at 54. This Court rejected that approach. The Court in *Shearer* explained that "the situs of the murder is not nearly as important as whether the suit requires the civilian court to second-guess military decisions, and whether the suit might impair

essential military discipline." *Id.* at 57 (citation omitted). The Court concluded that the allegations in the complaint "str[uc]k[] at the core of these concerns." *Id.* at 58. The allegations went "directly to the 'management' of the military," calling into question "basic choices about the discipline, supervision, and control of a serviceman." *Ibid.*

As the court of appeals recognized, the same conclusion is compelled in this case. The material allegations in petitioners' complaint are virtually identical to those of the complaint in *Shearer*. Here, as in *Shearer*, the complaint alleged that the Army was negligent in its supervision of a serviceman, and that the Army's negligent supervision led to the death of another serviceman. Here, as in *Shearer*, a court reviewing those allegations would have to inquire into decisions by the military about the discipline, supervision and control of its members. See *Shearer*, 473 U.S. at 57-58. The *Feres* doctrine is designed to avoid such an inquiry. See *Dozler* v. *United States*, 869 F.2d 1165 (8th Cir. 1989) (*Feres* bars FTCA claim against military for allegedly failing to warn servicemember about violent tendencies of another servicemember).

Petitioners contend that the court of appeals erred by focusing on "Private Tarver's condition as a serviceman with a mental disorder and the alleged negligence of a military hospital [in] treating that disorder." Pet. 19. They argue that the court should have focused instead on "the allegations of the Complaint relative to [McAllister]." Pet. 22-23.

The court of appeals was correct, however, to focus on the allegations in petitioners' complaint that claimed tortious conduct by the government. Those allegations, like the virtually identical allegations in

Shearer, call into question "basic choices about the discipline, supervision, and control of a serviceman," *Shearer*, 473 U.S. at 58.

Petitioners similarly ignore the analysis in *Shearer* when they argue that there was less of a "connection between the wrongdoer and the victim * * * of a military nature" in this case than there was in *Shearer*. Pet. 23. Petitioners base that argument on the assertion that "[i]n *Shearer* * * * the victim and wrongdoer knew each other and the genesis of the confrontation occurred while both were in a duty status." *Ibid.* Those facts, even if true, clearly were not relevant to the Court's analysis in *Shearer*, however, because they are not even mentioned in the Court's opinion.

Quite apart from *Shearer*, it is clear that petitioners' action is barred because the injury alleged was incident to service. See *United States* v. *Johnson*, 481 U.S. 681, 686-688 (1987); see also *United States* v. *Stanley*, 483 U.S. 669, 681-684 (1987). Lieutenant McAllister's death occurred on an Army base. Controlling what happens on military bases is an integral part of the military mission, as many courts have rightly held in applying *Feres* to bar FTCA suits seeking recovery for injuries sustained on military bases. See, *e.g.*, *Morey* v. *United States*, 903 F.2d 880 (1st Cir. 1990); *Millang* v. *United States*, 817 F.2d 533 (9th Cir. 1987); *Major* v. *United States*, 835 F.2d 641 (6th Cir. 1987), cert. denied, 487 U.S. 1218 (1988). The court of appeals was therefore correct in holding that the injury alleged in petitioners' complaint was "incident to service" and accordingly barred by *Feres*.

Contrary to petitioners' contention (Pet. 19-20), the court of appeals did not base its holding on a misreading of the Ninth Circuit's prior decision in *Per-*

sons v. *United States*, 925 F.2d 292 (1991). In *Persons*, the Ninth Circuit held that *Feres* barred a suit against the government brought by the estate of a serviceman who committed suicide, allegedly as a result of negligent psychiatric treatment at a military hospital. *Id.* at 294, 299. In the present case, the court of appeals recognized that "in *Persons* the decedent serviceman was *himself* the alleged victim of medical malpractice, whereas here the decedent serviceman was the victim of a failure to control a *second*, mentally disturbed serviceman"; the court determined, however, that this distinction did not save petitioners' complaint from the *Feres* bar. Pet. App. 12-13. That determination was clearly correct, since in *Shearer* the Court held that the *Feres* doctrine barred a suit in which the decedent serviceman was the victim of the military's alleged failure to control a second serviceman. The factual distinction between *Persons* and the present case serves only to bring the present case squarely within the holding of *Shearer*.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

KENNETH W. STARR
Solicitor General

STUART M. GERSON
Assistant Attorney General

ROBERT S. GREENSPAN
LOWELL V. STURGILL JR.
Attorneys

JANUARY 1992

☆ U. S. GOVERNMENT PRINTING OFFICE: 1992 312324 45285